

**Jitendra Kumar and anr. Vs. Krishna Dutt Sharma and anr.**

**Jitendra Kumar and anr. Vs. Krishna Dutt Sharma and anr.**

**SooperKanoon Citation :** [sooperkanoon.com/489863](http://sooperkanoon.com/489863)

**Court :** Allahabad

**Decided On :** May-01-2006

**Reported in :** AIR2006All257; 2006(4)AWC3379

**Judge :** Ashok Bhushan, J.

**Acts :** [Specific Relief Act, 1963](#) - Sections 41; Code of Criminal Procedure (CrPC) - Sections 145; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 5

**Appeal No. :** Civil Misc. W.P. No. 22910 of 2006

**Appellant :** Jitendra Kumar and anr.

**Respondent :** Krishna Dutt Sharma and anr.

**Advocate for Def. :** Mithilesh Kumar Tewari, Adv.

**Advocate for Pet/Ap. :** Dhruva Narayana and ;Bala Krishna Narayana, Advs.

**Judgement :**  
ORDER

**Ashok Bhushan, J.**

1. Heard counsel for the petitioner and Sri Mithlesh Kumar Tiwari appearing for the respondents No. 1 and 2. Both the counsels have agreed that the writ petition be disposed of at this stage without inviting counter affidavit. Learned Counsel for the

petitioners at the very outset has submitted that his prayer be confined only for quashing the order dated 21.4.2006 passed by the Additional District Judge, Bijnore rejecting the application of the writ petitioner filed in the of Appeal before the District Judge, Bijnore.

2. A suit No. 393 of 1996 was filed by the respondents seeking a decree for permanent injunction and for cancellation of an agreement to sale dated 14.8.1996. The trial Court vide its judgement and 'decree' dated 6.4.2006 decreed the suit. The relief of permanent injunction was granted in favour of the plaintiff with regard to disputed shops as described in List A and B of the paint. The defendants were restrained from interfering with the possession of the plaintiff. The agreement to sale dated 14.8.1996 was declared as void and inoperative. The trial Court further ordered that the plaintiff will be at liberty to take appropriate steps for taking possession of the shops in question. The counsel for the petitioners has submitted that both the shops in question are under attachment under Section 145 of the Criminal Procedure Code and neither the plaintiffs nor the defendants are in possession.

3. The learned Counsel for the respondents has supported the order passed by the learned District Judge.

4. An appeal has been filed by the petitioners before the appellate court against the aforesaid judgement and decree. In the appeal an application 6-C for staying the judgment and order of the trial Court was also made. The appellate court heard the application for 6-C stay of the judgment of the trial Court and has rejected the stay application. Learned Counsel for the petitioners challenging the order has submitted that the only reason given by the appellate court in rejecting the application is Section 41(b) of the [Specific Relief Act, 1963](#). Learned Counsel for the petitioners submits that Section 41(b) of the said Act has no application and the said provisions could not be a ground for rejecting the application filed by the plaintiffs for the stay of the judgment of the trial Court.

5. From perusal of the judgment of the appellate court it appears that since the trial court by the decree has given liberty to the plaintiffs to take appropriate steps for seeking possession of the shops in question, the appellate court proceeded under

impression that any stay order granted in the appeal will be in violation of Section 41(b) since the stay will be stopping the plaintiff in the court of the Sub Divisional Officer where the plaintiff may make an application for possession of the shops. The appellate court observed that the court of Sub Divisional Officer is not subordinate to the District Judge's court hence provisions of Section 41(b) is squarely applicable.

6. I have considered the submissions of counsel for the parties and perused the record.

7. Section 41(b) of the Specific Relief Act is to the following effect:

41. Injunction when refused...

An injunction cannot be granted\_\_\_\_\_.

(a)...

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought

8. In the present case the application which was filed by the writ petitioner was an application under Order XLI Rule 5 of the Civil Procedure Code. Under Order XLI Rule 5 C.P.C. the appellate court is empowered to stay execution of the judgment and decree of the trial Court. The Order XLI Rule 5 of the Code of Civil Procedure is extracted below:

5. Stay by Appellate Court, \_\_\_\_\_

(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(Explanation,...An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the

court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

(2) ...

9. The question for consideration before the appellate court was as to whether there are any good grounds for staying the judgment and order of the trial Court within the Order XLI Rule 5 of the Civil Procedure Code. While considering the stay application the appellate Court wrongly assumed that Order Section 41(b) is attracted in the facts of the present case. The liberty to the plaintiff to take steps before the Sub Divisional Officer's court for seeking possession of the attached property was liberty which flowed from the judgment and decree of the trial Court. It was open for the appellate Court to pass any order of stay with regard to the judgment of the trial Court and the power of stay cannot be controlled in any manner by Section 41(b) of the Specific Relief Act. Applicability of Section 41(b) could have been relevant before the trial court when any relief is claimed in a suit for injunction for restraining any person from executing or prosecuting any proceeding in a court not subordinate to that court from which the injunction is sought. Here is no such situation nor there was any prayer in the suit within the meaning of Section 41(b). The appellate Court committed error in misconstruing the power of the appellate Court under Order XLI Rule 5 of the Civil Procedure Code. The appellate Court having taken the view that the prayer of stay of the appellant being hit by Section 41(b) did not proceed to consider the stay application on merits hence the ends of justice be served in setting aside the order of the appellate Court dated 21.4.2006 and directing the appellate Court to consider the application 6-C afresh. The appellate Court having not considered the stay application on merits ends of justice be served in directing that till the application 6-C is considered and disposed of by the appellate Court. Status quo as existing today; with regard to the property in dispute. Shall be maintained.

10. With the aforesaid directions the writ petition is disposed of. This Court is not expressing any opinion on the merits of the stay application and the appellate court shall consider the stay application without being influenced by any observation made in this judgment. The appellate Court shall endeavour to decide the stay application expeditiously preferably within a period of three months from the date production of a certified copy of this order.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**